

VINCENT A. PEPPER
ROBERT F. CORAZZINI
PETER GUTMANN
JOHN F. GARZIGLIA
NEAL J. FRIEDMAN
ELLEN S. MANDELL
HOWARD J. BARR
MICHAEL J. LEHMKUHL *
SUZANNE C. SPINK *
MICHAEL H. SHACTER
KEVIN L. SIEBERT *
PATRICIA M. CHUH

* NOT ADMITTED IN D.C.

PEPPER & CORAZZINI

L. L. P.

ATTORNEYS AT LAW

1776 K STREET, NORTHWEST, SUITE 200

WASHINGTON, D. C. 20006

(202) 296-0600

GREGG P. SKALL

THOMAS M. MALLYCK

FREDERICK W. FORD

1909-1986

TELECOPIER (202) 296-5572

INTERNET PEPCOR@COMMLAW.COM

WEB SITE HTTP://WWW.COMMLAW.COM

DOCKET FILE COPY ORIGINAL

January 16, 1998

RECEIVED

JAN 16 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

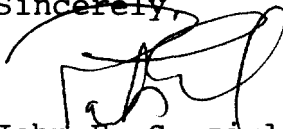
**Re: Reply to Opposition to Application for Review
concerning Amendment of Section 73.202(b),
Table of Allotments, FM Broadcast Stations
(Mt. Juliet and Belle Meade, Tennessee)
MM Docket No. 97-97; RM-9047**

Dear Ms. Salas:

Transmitted herewith on behalf of The Cromwell Group, Inc. is an original and four copies of its reply to the January 5, 1998 Opposition to Application for Review filed by Mt. Juliet Broadcasting, Inc. concerning the above-referenced rule making proceeding, pursuant to Section 1.115 of the Commission's Rules.

Should any questions arise concerning this matter, please contact this office directly.

Sincerely,


John F. Garziglia
Patricia M. Chuh

Enclosure

No. of Copies rec'd
List A B C D E

024

RECEIVED

JAN 16 1998

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b)) MM Docket N. 97-97
Table of Allotments) RM-9047
FM Broadcast Stations)
(Mt. Juliet and Belle Meade, Tennessee))

To: The Commission

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

The Cromwell Group, Inc. ("Cromwell"), by its attorneys, pursuant to Section 1.115 of the Commission's Rules, hereby respectfully submits its reply to the January 5, 1998 Opposition to Application for Review filed by Mt. Juliet Broadcasting, Inc. ("MJBFI").^{1/} In reply thereto, the following is submitted:

1. Although MJBFI is correct to state that Cromwell did not demonstrate in its Application for Review that it has standing, MJBFI erroneously assumes that Cromwell must do so. Section 1.115(a) of the Commission's Rules only requires a showing of standing when the person filing an application for review has not previously participated in the proceeding. Since Cromwell participated in the instant proceeding by filing comments on July 21, 1997 and filing a Petition for Reconsideration on August 12,

^{1/} Cromwell's Application for Review was timely filed on December 19, 1997. MJBFI's Opposition to Application for Review was filed on December 6, 1998. As such, the instant Reply to Opposition to Application for Review is timely filed, pursuant to §1.115(d) and §1.4 of the Commission's Rules.

Cromwell's Application for Review seeks review of the Policy and Rules Division's Memorandum Opinion and Order, MM Docket No. 97-97, RM 97-9047, released October 31, 1997, denying the Petition for Reconsideration of the Report and Order, MM Docket No. 97-97, RM 97-9047, released July 25, 1997, reallocating Channel 294A from Mt. Juliet to Belle Meade, Tennessee.

1997, which demonstrated Cromwell's standing, Cromwell is not required to demonstrate standing in its Application for Review.

2. More importantly, MJBFI's misconstrued attempts to distinguish its situation from Commission precedent, which mandates deletion of defective allotments, is insulting and misleading. MJBFI erroneously claims that the cases cited by Cromwell do not apply to the present situation because "none of the cases [cited by Cromwell] involved a fully-constructed station ready to be licensed, as WNPL was." See MJBFI's January 5, 1998 Opposition to Application for Review, at 4. MJBFI fails to mention, however, that its own station, WNPL, was not ready to be licensed! By MJBFI's own admission, the WNPL facility could not be legally built at the defective Mt. Juliet allotment. As such, WNPL was not a fully-constructed station that was ready to be licensed.

3. Furthermore, the case relied upon by MJBFI, Sanibel and San Carlos Park, Florida, 10 FCC Rcd 7215 (MMB 1995) ("Sanibel"), is not identical to the present situation involving MJBFI. Unlike the allotment of Channel 294A to Mt. Juliet, Tennessee, which was defective from its inception, the allotment of Channel 253A at Sanibel, Florida was made defective by outside forces. When the construction permit for Channel 253A at Sanibel, Florida was originally granted to Ruth Communications Corporation ("Ruth"), the permittee in Sanibel, there was an available transmitter site on which a broadcast station could be built. However, between

the time that Ruth^{2/} filed its application for a construction permit in 1983 and all appeals concerning the construction permit were exhausted in 1988, the actions of various federal, state, and local authorities effectively eliminated all available transmitter sites. As a result, the Commission reallocated Channel 253A from Sanibel to San Carlos Park, Florida. The reallocation of Channel 294A from Mt. Juliet to Belle Meade, Tennessee is completely different.

4. Unlike Sanibel, the allocation of Channel 294A to Mt. Juliet, Tennessee was defective from the beginning. In contrast to Ruth, who by no fault of its own lost all available transmitter sites, MJBFI was aware as early as June 27, 1990 that the Mt. Juliet allocation "would cause substantial adverse effects upon air navigation." See FAA Termination of Aeronautical Study of Proposed Construction or Alteration, April 19, 1991, attached as Exhibit No. 1 to Cromwell's August 12, 1997 Petition for Reconsideration. MJBFI thereafter obtained a construction permit for the defective Mt. Juliet, Tennessee allocation by promising that it would terminate operations upon notice of harmful interference to air navigational facilities. See Amendment to application of Jamal Broadcasting, L.P., July 31, 1991 (FCC File No. BPH-891011MJ), attached as Exhibit No. 2 to Cromwell's August 12,

^{2/} The original application for a construction permit at Sanibel, Florida was for Channel 285A and was filed by Hillebrand Broadcasting, Inc., a predecessor corporation to Ruth. In MM Docket No. 84-1314, 50 Fed. Reg. 32706, August 14, 1985, Channel 253A was substituted for Channel 285A at Sanibel, Florida.

1997 Petition for Reconsideration.^{3/} Since there is no site for which an FAA determination of hazard can be obtained, the allotment of Channel 294A at Mt. Juliet, Tennessee was defective from its inception. As a result, MJBFI ended up with a construction permit for an FM facility that could not be built. Thus, MJBFI, who voluntarily obtained a conditional construction permit for a defective allotment, cannot now be allowed to claim that the channel should be reallocated to Belle Meade, Tennessee. Such action essentially permits MJBFI to reapply for a construction permit for Belle Meade, Tennessee with cut-off protection, which is contrary to the Commission's rules and policies, and indeed is the ultimate in bootstrapping.

5. Simply put, MJBFI knowingly applied for the Mt. Juliet allotment, an allotment that was defective when allotted. It then claims that because it cannot build and license a facility at the defective allotment (surprise!), its construction permit should be modified to a new community that just happens to be immediately adjacent to Nashville, Tennessee. It is noteworthy to observe that there are many possible areas in which allotments can be made -- in the middle of lakes or oceans, on military bases, or in areas in which a proposed antenna cannot receive FAA approval -- where a station can never be built. Allotments made

^{3/} The application was originally granted to Jamal Broadcasting, L.P. ("Jamal"). See Public Notice Report No. 43573, released August 17, 1995. Jamal subsequently assigned the original WNPL [formerly WAOF(FM)] construction permit (BP-891012MS) to Mt. Juliet Broadcasting, Inc. ("MJBFI"), a corporation owned by Jamal (FCC File No. BAPH-960424GG).


to these areas are categorically defective. Under well-reasoned Commission precedent, the proper action to take in such situations is the deletion of the allotment upon discovery that a station cannot be built and the allotment is defective.

6. Since MJBFI itself conclusively demonstrated that the allotment of Channel 294A to Mt. Juliet, Tennessee is defective, the appropriate action under established Commission precedent is the deletion of the defective allotment. Indeed the deletion of the defective Mt. Juliet, Tennessee allotment is the only fair process the Commission may follow.

7. **Conclusion.** For the foregoing reasons, the Commission should reverse the Rules and Policy Division's Memorandum Opinion and Order, MM Docket No. 97-97, RM 97-9047, released October 31, 1997, delete the allotment of Channel 294A at Mt. Juliet, Tennessee, and rescind the grant of Mt. Juliet Broadcasting, Inc.'s February 21, 1997 modification application, specifying operation of WNPL on Channel 294A at Belle Meade, Tennessee.

Respectfully submitted,

THE CROMWELL GROUP, INC.

By: 
John F. Garziglia
Patricia M. Chuh
Its Attorneys

PEPPER & CORAZZINI, L.L.P.
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-0600

January 16, 1998

CERTIFICATE OF SERVICE


I, Dina Etemadi, a secretary in the law firm of Pepper & Corazzini, L.L.P., certify that the foregoing Reply to Opposition to Application for Review was mailed on this 16th day of January, 1998 to the following by first class mail, postage prepaid:

Douglas W. Webbink*
Chief, Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 545
Washington, D.C. 20554

Edward W. Hummers, Jr., Esq.
Thomas J. Hutton, Esq.
Holland & Knight LLP
2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037-3202
Counsel for Mt. Juliet Broadcasting, Inc.

John L. Tierney, Esq.
Tierney & Swift
1001 Twenty-Second Street, N.W.
Suite 350
Washington, D.C. 20037
Counsel for Great Southern Broadcasting Co., Inc.

Mr. David J. Waynick
Mayor of Mt. Juliet
City Hall
2425 Mt. Juliet Road
Mt. Juliet, TN 37122



Dina Etemadi

*Service by Hand Delivery